92-752

No._____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

A. LEONARD VARAH,

*Petitioner,*

-against-

UNITED STATES OF AMERICA,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## Questions Presented

1. Should this Court grant review to resolve a conflict between Circuits regarding the allocation of the burden of proof on the matter of withdrawal from a conspiracy, which matter has a direct bearing as well on petitioner's conviction for the substantive crimes of mail and securities fraud?

2. Did the Court of Appeals err in rejecting petitioner's claim that insufficient evidence of acts in furtherance of the conspiracy and of the mail fraud and securities fraud scheme charged had been adduced?[1]

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[1] The parties to the proceeding in the United States Court of Appeals for the Tenth Circuit were the United States of America, A. Leonard Varah, Michael W. Strand and Galen J. Ross.

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NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

A. LEONARD VARAH,

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-against-

UNITED STATES OF AMERICA,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## Opinions Below

The United States Court of Appeals for the Tenth Circuit affirmed a decision of the United States District Court for the District of Wyoming in an unpublished

Order and Judgment filed on July 30, 1992 which is set forth in the Appendix at page 1A. Thereafter, by Order filed August 31, 1992, the court granted petitioner's motion to stay the mandate pending the filing of a petition for certiorari by October 28, 1992. The court also rendered an Opinion and Order dated November 18, 1991, reported at 952 F.2d 1181, holding in abeyance appeals from the judgment of the United States District Court for the District of Wyoming pending the District Court's ruling on certain post-trial motions. The District Court (Alan B. Johnson, J.) issued its decision on the post-trial motions on February 4, 1992.

**Grounds for this Court's Jurisdiction**

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was entered on July 30, 1992. This Court has jurisdiction in this case pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

**Constitutional, Statutory and Rule Provisions Involved**

This petition involves the Due Process clause of the Fifth Amendment to the United States Constitution, 15 U.S.C. §§ 77q and 77x, 18 U.S.C. §§ 371, 1341 and 3282 and Federal Rule of Criminal Procedure 52(b) all of which are set forth as follows:

**United States Constitution, Amendment V.**

No person shall shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

15 U.S.C. § 77q.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received,

directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

**15 U.S.C. § 77x.**

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both.

**18 U.S.C. § 371.**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such

misdemeanor.

**18 U.S.C. § 1341.**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

**18 U.S.C. § 3282.**

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

**Federal Rule of Criminal Procedure 52(b).**

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

## Statement of the Case

### Introduction

The petitioner was convicted after a jury trial in the United States District Court for the District of Wyoming (Alan B. Johnson, J.) of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371, mail fraud in violation of 18 U.S.C. § 1341 and securities fraud in violation of 15 U.S.C. §§ 77q and 77x. On August 21, 1987, he was sentenced to a four-year term of imprisonment on the conspiracy count and to a consecutive three-year term on the mail fraud count. Imposition of sentence on the remaining counts was suspended, but petitioner was placed on probation for five years commencing upon completion of his term of imprisonment. He was also fined $150,000. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

A Notice of Appeal of the judgment of conviction was filed on August 31, 1987, and the District Court thereafter permitted petitioner to remain free on bail pending disposition of the appeal. Subsequently, the district court denied post-trial motions filed by petitioner. In an unpublished Order and Judgment filed July 30, 1992, a panel of the Tenth Circuit Court of Appeals affirmed the decision of the District Court denying the post-trial motions. Thereafter, by Order filed August 31,

1992, the Tenth Circuit Court of Appeals granted petitioner's motion for a stay of the mandate until October 28, 1992 pending petitioner's application to the United States Supreme Court for a writ of certiorari.

## Statement of Facts

By indictment filed September 23, 1986, the government charged that petitioner and co-defendants Michael Strand (Strand), Galen Ross (Ross) and Rex Peterson (Peterson) (against whom the case was dismissed at the close of the government's proof on the ground that prosecution of the offenses charged against him was barred by the Statute of Limitations), individually and through several business entities had conspired to defraud investors by misrepresenting the potential of investments in uranium, oil and gas reserves in Rawlins, Wyoming. Additionally, the defendants were charged with mail and securities fraud. The entities that figured most prominently in the government's case were Classic Mining Corporation (Classic) controlled by Strand and Ross, Living Industries, Inc. (Living) controlled by petitioner, and Overland Dome Petroleum Company (Overland), a joint venture of Classic and Living formed to explore for oil and gas in the Overland Dome Field (Field) near Rawlins, Wyoming. The indictment alleged that the scheme had commenced in 1977 and had continued until the filing of the indictment.

The conspiracy count, Count I, alleged several overt acts on the part of the petitioner with the penultimate overt act having taken place on September 2, 1981 and with the last act being petitioner's mailing of a letter to investors on July 16, 1982, thus bringing his role in the alleged conspiracy within 18 U.S.C. § 3282

providing for a five-year period of limitations. This July 16, 1982 letter was also alleged to be a mailing in execution of a mail fraud and securities fraud scheme charged in Counts IX to XII. His mailing of another letter to investors on January 19, 1983 was alleged to be in execution of the mail fraud scheme as charged in Count XIII. The letters are discussed in detail hereafter.

In defense, petitioner (through his counsel) contended that he had not participated in any scheme or conspiracy to defraud because he had never knowingly misrepresented to the public or to investors the potential mineral resources of the investments. Petitioner's role in the entities was to raise funds for uranium, oil and gas exploration. In short, petitioner, who was based in New York City thousands of miles from the site, had no personal knowledge of production, relying instead on information given to him by Strand and others who actually worked on the project at the site. Additionally, petitioner contended that, so far as he was aware, the funds raised from investors had been used for exploration, that he had received no improper financial remuneration and that, if funds had been misappropriated, such actions were done by Strand without petitioner's knowledge.

Petitioner also contended that, to the extent that the government had established petitioner's participation in the charged scheme and conspiracy, the evidence showed that petitioner had withdrawn from that scheme and conspiracy more than five years prior to the filing of the indictment and that his letters to investors dated July 16, 1982 and January 19, 1983, which had been sent after he had withdrawn from any affiliation with Strand and the conspiracy, could not be construed as having been sent in furtherance of the conspiracy and the mail fraud and securities fraud

scheme.[2]

The July 16, 1982 letter to investors enclosed a letter dated July 13, 1982, detailing petitioner's dispute with Strand, his financing of a lawsuit against Strand's forces in Classic, and his effort to compel an involuntary bankruptcy of a Strand company. The government contended throughout the course of proceedings that this letter was a "lulling" letter and relied upon it to establish the continuation of the conspiracy and to form the basis for the substantive mail and securities fraud counts. Significantly, during pretrial proceedings, the District Court Judge commented that this "letter would panic me if I were an investor" (Transcript of 4/10/87 at p. 26).

The second letter to investors, dated January 19, 1983, referred to the lawsuit filed against Classic and Strand in April 1982 by Raymond Lyell, an investor and for a time a member of the Board of Directors of Classic. Petitioner had assisted Lyell in mounting the suit by providing him with information and financing. Nevertheless, in late fall 1982, Lyell amended his complaint to include petitioner as a defendant and then sought funds from other investors to continue the action. In response to these actions, petitioner wrote the January 1983 letter to correct certain misstatements in Lyell's written request for money and to urge the investors to consult with their own attorneys in this matter. Like the July 1982 letter, this letter which was the basis for a mail fraud count could well have panicked investors. The two letters which, according to the government, were "lulling letters" brought the case

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2 The letters, Trial Exhibits 41 and 317 (also denominated 323) are set forth in the appendix at pages a12 and a18, respectively.

against the petitioner within the statute of limitations.

Judge Johnson's charge to the jury included instructions on the defense of withdrawal from the conspiracy, thus recognizing that petitioner had adduced evidence of withdrawal. These instructions, however, failed to inform the jury that the government bore the burden of disproving withdrawal beyond a reasonable doubt. Rather, Judge Johnson instructed the jury that the defendant bore the burden of establishing withdrawal. The court's charge on withdrawal (Tr. at 3134-3136) consisted of the following:

> Regarding possible withdrawal of a defendant from a conspiracy, you are instructed that once it is shown to your satisfaction that a defendant knowingly joined a conspiracy he is presumed in law to be a member of the conspiracy until it affirmatively appears from the evidence that the defendant in good faith disavowed and completely withdrew from any participation in the conspiracy. The burden of establishing an abandonment of or a withdrawal from a conspiracy lies with the defendant. An individual may withdraw or abandon a conspiracy by renunciation or by engaging in conduct which is inconsistent with the idea of continued participation in the alleged scheme. The mere cessation of activity in furtherance of the conspiracy is not sufficient to establish withdrawal.
>
> For a defendant to be deemed to have withdrawn there must be evidence showing withdrawal by some affirmative

action. An example of such affirmative action is demonstrated when the defendant makes a clean breast to the authorities or notifies the other members of the conspiracy of a termination of his participation. Such action must consist of a definite and decisive step of some kind which shows a complete dissociation.

For example, to disavow or defeat the purpose of the conspiracy or some other conduct wholly inconsistent with continued adherence to the conspiratorial objects would be the type of decisive act that a party could look to as being the basis for withdrawal.

If you believe that a defendant's actions amounted to an affirmative act of withdrawing, defeating, disavowing, or abandoning the conspiracy and one, that such act occurred before an overt act was committed in furtherance of the conspiracy, or two, that such affirmative act occurred on or before September 18, 1981, then that defendant is not guilty of the crime of conspiracy.

However, if you the jury determine that the defendant has not met his burden of showing a withdrawal, disavowal or abandonment, you may reject the defense of withdrawal or abandonment. Whether any defendant withdrew from the conspiracy under the instruction given to you is a question of fact for you to decide.

In addition, the trial court failed to give a charge on withdrawal from the substantive mail and securities fraud scheme, notwithstanding evidence of withdrawal from the scheme. Trial counsel did not voice an exception either to the charge on withdrawal from a conspiracy or to the failure to instruct the jury on withdrawal from the substantive scheme charged in the indictment.

After deliberation, the jury convicted petitioner on the conspiracy, mail fraud and securities fraud counts. The District Court imposed sentence and thereafter denied petitioner's post-trial motions.

On appeal of the decision denying the post-trial motions, a panel of the Tenth Circuit Court of Appeals affirmed. As to the issue of burden of proving withdrawal, that court, although noting the government's concession to the contrary, unequivocally stated that "Tenth Circuit law clearly places the burden on the defendant," and therefore "the district court correctly instructed the jury that the defendant bears the burden of proving that he withdrew from a conspiracy." Slip opn. at 6. In reaching the issue and in ruling as it did, the court implicitly held that a matter implicating "plain error" was involved and that petitioner had sustained his burden of coming forward with evidence of withdrawal.

Additionally, the court rejected petitioner's contention that the mailings upon which the government relied as having been sent in furtherance of the mail and securities fraud scheme were not "lulling letters". Slip opn. at 7-9.

## Reasons for Granting the Writ

### 1. Introduction

This case presents a significant opportunity for this Court to settle the law of the land regarding the burden of proof for withdrawal from a conspiracy and from connection with a mail fraud and securities fraud scheme. Upon review, this Court should adopt the holding of the Seventh Circuit which, consistent with fundamental principles of due process enunciated by this Court, places the burden on the government of disproving withdrawal from a conspiracy. See United States v. Read, 658 F.2d 1225, 1236 (7th Cir. 1981); accord United States v. Burton, 724 F.2d 1283, 1287 (7th Cir. 1984); see also United States v. Rossy, 953 F.2d 321, 325 n.3 (7th Cir. 1992).

The Tenth Circuit Court of Appeals, ignoring the rulings of the Seventh Circuit, held that the charge in this case correctly placed the burden on the petitioner of proving withdrawal from a conspiracy and, implicitly, from a mail fraud and securities fraud scheme. While the ruling sought to be reviewed is unpublished, the court expressly relied for its holding on a line of Tenth Circuit decisions to the same effect. See Slip opn. at 6. This Court, therefore, is presented with an irreconcilable conflict between the Circuits which merits resolution.[3]

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3 As indicated in United States v. Parnell, 581 F.2d 1374, 1384 (10th Cir. 1978), cert. denied, 439 U.S. 1076 (1979), cited by the Circuit Court in its Order and Judgment, see Slip Opn. at 6, the Second and Fifth Circuits also hold that the burden of establishing withdrawal from a conspiracy is on the defendant. See United States v. Pearson, 508 F.2d 595, 597 (5th Cir.), cert. denied, 423 U.S. 845 (1975); United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965);

## 2. Merits of the Issues

### a. The trial court committed reversible error by failing to instruct the jury that the government bore the burden of disproving beyond a reasonable doubt petitioner's withdrawal from the conspiracy and the substantive scheme charged

The fundamental right to due process guaranteed by the Fifth Amendment requires the government in a criminal case to prove beyond a reasonable doubt every element of the crime charged. Patterson v. New York, 432 U.S. 197, 215 (1977); Mullaney v. Wilbur, 421 U.S. 684, 685, 701-702 (1975); In re Winship, 397 U.S. 358, 364 (1970); Davis v. United States, 160 U.S. 469, 487-488 (1895). This basic obligation has inherent in it the requirement that, where a defense is raised which goes to an essential element of the crime charged, the government carries the burden of disproving any such defense beyond a reasonable doubt. See Patterson, 432 U.S. at 210; Mullaney, 421 U.S. at 701-704; Davis, 160 U.S. at 485-488; United States v. Lofton, 776 F.2d 918, 920 (10th Cir. 1985); Read, supra, 658 F.2d at 1232-1233, 1232 n. 3, 1236.

In accordance with these principles, trial judges must instruct the jury on each and every element of the crime charged, on the government's burden of proving each of those elements beyond a reasonable doubt and on the government's burden of disproving all defenses which negate an essential element of the offense, also

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accord United States v. Hamilton, 689 F.2d 1262 (6th Cir.), cert. denied, 459 U.S. 1117 (1982); United States v. Boyd, 610 F.2d 521 (8th Cir. 1979), cert. denied, 444 U.S. 1089 (1980); United States v. Quesada-Rosadal, 685 F.2d 1281 (11th Cir. 1982).

beyond a reasonable doubt. Patterson, supra, 432 U.S. at 210; Mullaney, supra, 421 U.S. at 701-704; Read, supra, 658 F.2d at 1236.

The Seventh Circuit, in Read, addressed the defense of withdrawal from a conspiracy. The Read court noted that "membership" is an essential element of the crime of conspiracy and that withdrawal directly negates that element. Id. at 1232. Moreover, when the defense of withdrawal is coupled with the assertion that it occurred more than five years before the filing of the indictment, withdrawal presents a complete defense to conspiracy. Id. at 1232-1233. In this context, the failure to properly instruct the jury on withdrawal undermines the validity of the fact-finding process on a critical element of the crime charged. Id. at 1237-1239.

In reversing the conviction, the Read court held that, once the defendant advances some evidence as to his defense, the government must disprove that defense beyond a reasonable doubt, and the jury must be explicitly instructed accordingly. Read, supra, 658 F.2d at 1236; accord Burton, supra, 724 F.2d at 1287; see also Rossy, supra, 953 F.2d at 325 and 325 n. 3.

Application of the analysis in Read to the instant case (where the trial court's instructions on the burden of proving withdrawal were wholly deficient) mandates that the conviction not only for conspiracy but also for mail and securities fraud be reversed and that a new trial be ordered. First, the trial judge in his instructions on withdrawal from the conspiracy failed completely to state that the government bore the burden of disproving the defense beyond a reasonable doubt. On the contrary, the trial judge told the jury twice that the burden of establishing withdrawal from the conspiracy is on the petitioner. Second, the trial judge failed to instruct the

jury on the applicability of the withdrawal defense to the substantive crimes of mail and securities fraud, even though that defense is available to those crimes. Pertinent here on the issue of petitioner's withdrawal from the mail fraud and securities fraud scheme is Glazerman v. United States, 421 F.2d 547 (10th Cir.), cert. denied, 398 U.S. 928 (1970). There, the court looked to see whether the defendant was a member of the conspiracy charged at the time the substantive mail fraud acts occurred. Finding that defendant was not, the court viewed him as having withdrawn as a participant in the substantive fraud counts. Id. at 551-552; accord United States v. Rogers, 624 F.2d 1303, 1308 n. 14 (5th Cir. 1980), cert. denied sub nom. Anthony I. Bertucci Constr. Co., Inc. v. United States, 450 U.S. 917 (1981); United States v. Knippenberg, 502 F.2d 1056, 1059 (7th Cir. 1974); United States v. Cohen, 516 F.2d 1358, 1364 (8th Cir. 1975); United States v. Kaminski, 692 F.2d 505, 514 (8th Cir. 1982); cf. United States v. Redmond, 546 F.2d 1386, 1390 (10th Cir. 1977), cert. denied, 435 U.S. 995 (1978).[4]

From the outset of the proceedings below, petitioner's defense was that his working relationship with Strand had terminated before September 1981, and that as of that time he was not only not working with Strand, he was working to defeat him.

At trial, Jack Shaw, a member of Living's Board of Directors testified that there was great hostility and no communication between Strand and petitioner from the middle of 1981 until the time of trial. Dr. Diane Nelson, the geologist who worked on the Field, and subsequently

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[4] Read, supra, 658 F.2d at 1239, 1240, unaccountably differs from the cases in the other Circuits on the point.

for Strand's company, Mingo Oil, confirmed that by the middle of 1981 there was a dispute between Strand and petitioner about the operation of the Field. Lenore Laskin testified that prior to September 1981 (at which time Laskin ceased being president of Living) petitioner had reported to the Board of Directors that Strand was not properly running the Field. Raymond Lyell, an investor and member of the Board of Directors of Classic, testified that antagonism between Strand and petitioner came to a head in the latter part of 1981 and that they were certainly not working together at that time. Similarly, Dr. Gerald Stern, another investor in some of the limited partnerships and in Classic stock, testified that in the fall 1981 he had had conversations with petitioner in which petitioner had disparaged both Strand and Ross and said that they could not do the job.

Everything that occurred after September 18, 1981 confirmed that petitioner had previously withdrawn from any community of interest or activity he had had with Strand. Thus, in October 1981, petitioner consulted counsel for the purpose of suing Strand, and in November 1981 he actually sued him. A flurry of letters in November 1981 point up the fact that the relationship between Strand and petitioner had been destroyed. By way of example, in one letter Strand's representatives at Classic stated that Strand and petitioner "would not work with each other," that "they refused to communicate and were vociferous in their criticism of each other" and that Strand would provide no information to petitioner for fear that petitioner will sabotage his work. Thereafter, petitioner was instrumental in funding and otherwise assisting in the stockholders' suit brought by Lyell against Classic and Strand. In April 1982, petitioner, through a subsidiary of Living, commenced an involuntary bankruptcy action against Overland in order to protect the assets and the limited partners from the threat of

foreclosure on liens that Strand had filed on the property. Lastly, the two letters written by petitioner constitute further, albeit indirect, evidence that petitioner had indeed severed his ties with Strand and had withdrawn from the conspiracy and the alleged mail and securities fraud scheme.

The trial court's failure to specifically instruct the jury as to the government's burden of disproving beyond a reasonable doubt a defense which negates an essential element of the crime charged affects a defendant's substantial and fundamental rights and therefore constitutes prejudicial error that may be noticed on appeal, notwithstanding the absence of a contemporaneous objection at trial, under the "plain error" doctrine. See United States v. Frady, 456 U.S. 152, 163 and nn. 13 and 14 (1982); United States v. Lofton, supra, 776 F.2d at 922; United States v. Aitken, 755 F.2d 188, 193-194 (1st Cir. 1985); Government of Virgin Islands v. Brown, 685 F.2d 834, 839 (3d Cir. 1982); United States v. Hudson, 564 F.2d 1377, 1380 n.3 (9th Cir. 1977); United States v. Pope, 561 F.2d 663, 670-671 (6th Cir. 1977); Fed. R. Crim. P. 52(b). As noted above, the Tenth Circuit treated the attack on the trial court's charge as implicating the plain error doctrine, thus recognizing that if the charge was erroneous it involved petitioner's fundamental right to due process. See Lofton, supra, 776 F.2d at 920-921. The error below should be remedied by a new trial in which the jury is properly instructed on the allocation of the burden of proof of withdrawal from the conspiracy and from the substantive mail and securities fraud scheme.

**b. The convictions for mail and securities fraud must be reversed for insufficiency of evidence on the ground that neither the July 1982 nor the January 1983 letters were "lulling letters" as a matter of law**

**i. Mail Fraud Conviction**

In order to meet the jurisdictional requirements of the mail fraud statute, a mailing must be in furtherance of the government's charged scheme to defraud. See 18 U.S.C. § 1341. More specifically, "the mailing must be 'for the purpose of executing the scheme'". United States v. Maze, 414 U.S. 395, 402 (1974) (quoting Kann v. United States, 323 U.S. 88, 94 (1944)). Therefore, a letter mailed by a defendant after the scheme to defraud has "reached fruition" or been terminated cannot be in furtherance of the scheme unless the letter had a specific type of lulling effect upon its recipient. See United States v. Lane, 474 U.S. 438, 451-452, 452 n.16 (1986); Maze, 414 U.S. at 402. Viewing the facts in this case in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), the evidence is without contradiction that petitioner had withdrawn from the alleged scheme months before the July 1982 and January 1983 mailings in question. Moreover, again viewing the evidence in the light most favorable to the government, the mailings cannot be construed as "lulling letters" in furtherance or in execution of the scheme charged in the indictment.

A lulling letter in the context of a fraud scheme is one that is "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." Maze, supra, 414 U.S. at 403; see also Lane, supra, 474 U.S. at 451-452.

Petitioner's two mailings cannot be construed to be lulling letters as a matter of law, and therefore a judgment of acquittal should have been rendered on the mail fraud counts and they should not have been submitted to the jury.

The July 1982 mailing, sent on the advice of counsel, apprised investors in both Living and the limited partnerships of substantial disputes between the Varah and Strand forces, the approximately $4.6 million in liens filed on the oil field by Strand's companies, Living's considered, yet deferred, legal action to challenge the Mingo Oil contract to dig the deep test well and the involuntary bankruptcy proceeding commenced against the general partner of the limited partnership so as to secure the assets from foreclosure by Strand. This letter even announced that the commencement of a class action partially financed by Living against Classic was based on allegations of mismanagement by the Classic forces, their failure to make full and fair disclosure of corporate activities, their formation of a conspiracy to improperly issue stock in Classic, and on the diversion of Classic's assets for personal use. As to this mailing, the Trial Court judge commented during pretrial proceedings that this "letter would panic me if I were an investor" (Tr. of 4/10/87 at 26).

Similarly, the January 19, 1983 letter sent by petitioner to limited partners in response to Raymond Lyell's plea for financial help corrected misstatements in Lyell's letter, described the legal action initiated by petitioner against Strand "to prevent Strand from foreclosing" on the oil field, mentioned the $2,000,000 "which we believe had been looted from the company", and twice urged the investors to seek advice from their attorneys and to show their attorneys the contents of that

very letter.

The letters here involved are similar to the mailings in Maze which were held not to be in execution of the schemes charged. Agreeing with this determination, this Court affirmed the lower court's reversal of a mail fraud conviction on the ground, applicable here, that the mailings were not in execution of the scheme. 414 U.S. at 403-405.

In Lane, on the other hand, this Court, which granted certiorari in part to determine whether there was sufficient evidence in the case to support convictions for mail fraud under 18 U.S.C. § 1341, see 474 U.S. at 440, affirmed a ruling by a Court of Appeals which, like the ruling at bar, rejected a claim of insufficiency of the evidence based on the content of the mailings. 474 U.S. at 443, 452-453.

Thus, it is clear that the claim here of the insufficiency of the evidence of mailings in execution of the fraud scheme charged against the petitioner is appropriate for this Court's review.

As a matter of law, neither the July 1982 nor the January 1983 letter can be construed as having lulled recipients into a false sense of security or lowered their apprehensions about investments they had made. On the contrary, the mailings heightened those apprehensions by red-flagging problems concerning the limited partnership and turning the spotlight on previously undisclosed risks relating to the investments. If anything, these letters hastened the likelihood of disclosure and made detection of the alleged scheme a foregone conclusion.

Accordingly, the conviction for mail fraud (Counts IX, X and XIII) must be reversed and a judgment of acquittal entered.

### ii. Securities Fraud Conviction

Like the mail fraud statute, the securities fraud provisions, 15 U.S.C. §§ 77q and 77x, require the government to prove the existence of a scheme to defraud (incident to the purchase or sale of a security) and use of the mails in furtherance of that scheme. Redmond, supra, 546 F.2d at 1389-1390; United States v. Mackay, 491 F.2d 616, 619 (10th Cir. 1973), cert. denied, 416 U.S. 972 (1974).

To find a defendant criminally liable for post-sales securities fraud offenses, the government must prove that the letters were lulling letters "incident to the carrying out of the scheme." Mackay, 491 F.2d at 620 and 620 n.2.

The July 1982 letter (the only letter charged as a basis for securities fraud) was anything but lulling or incident to the carrying out of the government's charged scheme and therefore cannot sustain the conviction. Accordingly, the conviction for securities fraud (Counts XI and XII) must be reversed and a judgment of acquittal entered.

## Conclusion

For the reasons stated above, the Court should grant the petition for a writ of certiorari and, upon review, should reverse the Order and Judgment of the Tenth Circuit and remand the matter with directions that judgments of acquittal should be entered for the mail and securities fraud convictions and that a new trial should be held on the conspiracy count.

Respectfully submitted,

Frederick H. Block
*Counsel of Record*
ORENSTEIN MUSOFF &
ORENSTEIN, P.C.
S. Edward Orenstein
Jeffrey Niederhoffer
*Attorneys for Petitioner*

# APPENDICES

**APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED JULY 30, 1992.**

FILED
United States Court of Appeals
Tenth Circuit
JUL 30 1992
ROBERT L. HOECKER
Clerk [stamp]

# United States Court of Appeals

TENTH CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

A. LEONARD VARAH,

*Defendant-Appellant.*

No. 87-2320
(D. Wyo. No. 86-00063-01J)

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

MICHAEL W. STRAND and GALEN ROSS,

*Defendants-Appellants.*

No. 87-2354 & 87-2355
(D. Wyo. Nos. 86-00063-02J & 86-00063-03J)

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## ORDER AND JUDGMENT*

Before TACHA, BALDOCK, and EBEL, Circuit Judges.

### I. BACKGROUND

This case arises out of a scheme to defraud investors by knowingly misrepresenting the investment potential of certain gas, oil, and uranium properties and by misappropriating investors' funds. The appellants commenced this scheme in 1977. In 1986, the government filed an indictment charging the appellants with mail fraud, securities fraud, and conspiracy to commit mail fraud.

In order to salvage Classic Mining Corporation ("Classic"), Appellant Galen J. Ross (president of Classic) and Appellant Michael W. Strand (a significant shareholder) acquired a controlling interest in uranium claims located in Wyoming. Without obtaining evidence as to the value of such claims, Ross and Strand launched a promotion of Classic stock by sponsoring field trips for stockbrokers, sales seminars, and news articles. To assist them in their efforts to locate investors and to raise funds for uranium, oil, and gas exploration, they hired Appellant A. Leonard Varah as a stock promoter in 1978.

In addition to Classic, the appellants employed many corporate vehicles to further their financial endeavors. In particular, the appellants stimulated public investment by promoting several joint ventures in which the appellants or companies owned or controlled by the appellants played important roles. The record reveals that the appellants were less than forthcoming when they explained these ventures to their investors.

For example, Classic entered into a joint venture with Fulton Investment Corporation ("Fulton"), by which Classic agreed to sell

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

ore to Fulton. Classic neglected to tell its shareholders that Varah was a controlling figure in Fulton and that Classic had far less ore than Fulton had agreed to buy. Not surprisingly, this agreement never came to fruition.

In addition, Classic entered into a joint venture known as Overland Dome Petroleum Company ("Overland") for the purpose of oil and gas exploration with Living Industries, Inc. ("Living"). Varah, who was president of Living, developed a program for the public sale of limited partnership interests in each well to be drilled.[1] Even though the cost to drill each well varied substantially, investors paid over $200,000 per well regardless of actual cost. The substantial profits derived from the difference between the amount invested and the actual costs were not passed back to or even reported to the investors.

Furthermore, the record reveals that the appellants used the mails and other means to distribute false and misleading information regarding the operations of Classic and Living. Specifically, the appellants circulated deceptive information regarding the extent and value of Classic's uranium reserves and contracts for the sale of such uranium, inflated production results from Classic's oil and gas wells, and falsified or concealed information about the scope and nature of their criminal background and financial interests in the enterprise.

As a result of the appellants' activities, the price of Classic and Living stock rose dramatically and investors contributed 6.5 million dollars to limited partnerships. In addition, Strand and Varah realized hundreds of thousands of dollars in profit when they sold substantial amounts of their shares in the two companies.

The scheme went sour, however, in 1981. Suspicious investors,

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[1] In addition, Varah offered and sold interests in limited partnerships to finance the construction of a pipeline to the various gas wells.

who had received no return on their investment, began to doubt the glowing reports they had been receiving and to demand actual production figures. Dissension arose between Classic and Living with respect to the oil and gas joint venture. Varah's relationship with Strand and Ross deteriorated such that communication between them ceased, particularly after Varah filed for Chapter 11 bankruptcy on behalf of Overland against the wishes of Strand and Ross. In the midst of this turmoil, the appellants attempted to placate the investors through several letters. It was too late.

On September 18, 1986, the appellants were indicted for their respective roles in the above activities. A jury trial took place in May 1987 in the United States District Court for the District of Wyoming. The jury found Varah, Strand, and Ross guilty of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371. In addition, Varah was convicted of mail fraud in violation of 18 U.S.C. § 1341 and securities fraud in violation of 15 U.S.C. §§ 77q and 77x. Strand and Ross were convicted of mail fraud and aiding and abetting mail fraud in violation of 18 U.S.C. §§ 2 & 1341.

Varah and Strand were each sentenced to a four-year-term of imprisonment for conspiracy. In addition, Varah received a consecutive three-year-term for mail fraud, and Strand received a consecutive three-year-term for aiding and abetting mail fraud. In addition, the court fined them $150,000, suspended imposition of sentence on the remaining counts, and placed them on probation for five years, to commence after completion of their terms of imprisonment. Ross was fined $10,000 and placed on a five-year-term of probation.

They now appeal their convictions on numerous grounds. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Because the evidence presented below overlapped, we will decide all three appeals in this single order and judgment. For the reasons detailed *infra*, we affirm the decision of the district court.

## II. DISCUSSION

A. Varah

Varah raises three issues on appeal. First, he contends that the trial court erroneously instructed the jury that the defendant bears the burden of proving that he withdrew from the conspiracy, thereby violating his due process rights. Second, he alleges that his conviction for mail and securities fraud should be reversed because the mailings that formed the basis for his conviction were not in furtherance of the charged scheme. Third, he argues that he was denied reasonably effective assistance of counsel in violation of the Sixth Amendment. We reject these contentions for the following reasons.

First. the district court correctly instructed the jury that the defendant bears the burden of proving that he withdrew from a conspiracy. *See* R., Vol. V, Doc. 131, Instr. 45 ("Regarding possible withdrawal of a defendant from a conspiracy, you are instructed that once it is shown to your satisfaction that a defendant knowingly joined a conspiracy he is presumed in law to be a member of the conspiracy until it affirmatively appears from the evidence that the defendant in good faith disavowed and completely withdrew from any participation in the conspiracy. The burden of establishing an abandonment of or a withdrawal from a conspiracy lies with the defendant..."). Notwithstanding the government's concession to the contrary, *see* Brief of Appellee at 33, Tenth Circuit law clearly places the burden on the defendant. *See United States v. Fox*, 902 F.2d 1508, 1516 (10th Cir.), *cert. denied*, 111 S. Ct. 199 (1990); *United States v. Record*, 873 F.2d 1363, 1369 (10th Cir. 1989); *United States v. Cardall*, 885 F.2d 656, 668 n.22 (10th Cir. 1989); *United States v. Parnell*, 581 F.2d 1374, 1384 (10th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979); *United States v. Burger*, 773 F. Supp. 1430, 1440 (D. Kan. 1991).

Varah's argument that the defendant bears only the burden of coming forward with evidence sufficient to place the defense in

issue is without merit. Although most of the cases in this Circuit state that the defendant has the burden of "establishing" withdrawal rather than "proving" withdrawal, it is clear that "establishing" in this context encompasses the burden of persuasion. *See* Black's Law Dictionary 490 (5th ed. 1979) (equating "establish" with "put beyond doubt or dispute; prove; convince"); *see also United States v. Hollis*, 569 F.2d 199, 204 n.6 (3rd Cir. 1977).

Second, Varah alleges that his conviction for mail and securities fraud should be reversed because the mailings that formed the basis for his conviction were not in furtherance of the charged scheme as required by 18 U.S.C. § 1341 and 15 U.S.C. § 77q respectively. *See United States v. Mackay*, 491 F.2d 616, 619 (10th Cir. 1973) ("The offense of securities fraud is quite similar [to mail fraud] in that is also calls for proof of a scheme or design to defraud incident to the purchase or sale of a security. Here again, there must be the use of an instrumentality of interstate commerce or of the mails in furtherance of that scheme or design."), *cert. denied*, 416 U.S. 972 (1974); *United States v. Lynn*, 461 F.2d 759. 762-63 (10th Cir. 1972) ("Utilization of the mails after [a] scheme has been fully consummated and completed in all of its parts cannot supply the essential ingredients for [mail fraud]... The federal mail fraud statute does not purport to reach all frauds, but only those instances in which the use of the mails is a part of the execution of the fraudulent scheme.").

Varah alleges that the scheme terminated when he withdrew from the conspiracy or, alternatively, that the mailings upon which the government relies were not "lulling letters" written in furtherance of an existing scheme. We reject these contentions. Viewed in the light most favorable to the government, the record supports the jury's decision that Varah did not satisfy his burden of proving that he withdrew from the conspiracy. Similarly, a reasonable jury could have concluded that the mailings in dispute constitute lulling letters.

A lulling letter is a mailing that is "designed to lull the victims

into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States v. Maze*, 414 U.S. 395, 403 (1974); *see also S.E.C. v. Holschuh*, 694 F.2d 130, 144 n.24 (7th Cir. 1982) (For mail fraud and securities fraud, "'[a] scheme to defraud may well include later efforts to avoid detection of the fraud... Avoidance of detection and prevention of recovery of the money lost by the victims are within, and often a material part of, the illegal scheme. Further profit from the scheme to defraud, as such, may be over, and yet the scheme itself may not be ended.'") (citation omitted).

Due to the five-year statute of limitations applicable pursuant to 18 U.S.C. § 3282, only three mailings are in dispute. First, on April 6, 1982, Ross sent a letter to the shareholders of Classic. *See* Ex. 39[2] This letter painted an optimistic picture of Classic's future and failed to mention any of the problems that plagued Classic at that time. It appraised [sic] the shareholders of the "progress being made by Classic" and announced the drilling of a new deep well and of existing wells in conjunction with Mingo Oil Company ("Mingo"), without disclosing that Strand was a principal of Mingo. Second, on July 16, 1982, Varah sent a letter to the limited partners of Overland. This letter announced that disgruntled investors had filed a class action against Ross and Strand and implicitly exonerated Varah. *See* Ex 41. Third, Varah sent another letter to the limited partners of Overland on January 19, 1983, after Varah had been added as a defendant in the class action, assuring them that Living was protecting the rights of all investors and urging them, successfully, not to provide financial support for the suit. *See* Ex. 323.

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[2] The scheme had clearly not yet terminated as of this date, as the appellants contend, because Srand solicited funds from one of the limited partners in May 1982.

Varah correctly points out that some courts have concluded that mailings that have the effect of alerting the recipient to a fraudulent scheme are not lulling letters. Appellant's Brief at 33-37. In many of these cases, however, the letters *could not* reasonably be interpreted as an attempt to lull the recipients into inaction. *See e.g., United States v. Castile*, 795 F.2d 1273, 1279-80 (6th Cir. 1986); *Gordon v. United States*, 358 F.2d 112, 115 (5th Cir. 1966). Here, the mailings in dispute contain statements that *could* reasonably be construed as an attempt to lull the investors into a false sense of security and thereby to postpone investigation into the appellants' scheme. Accordingly, we refuse to set aside the jury's verdict on this ground.

Finally, Varah argues that he was denied reasonably effective assistance of counsel as guaranteed by the Sixth Amendment.[3] In evaluating this claim, we bear in mind that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). We conclude that Varah has failed to show that "there is a reasonable probability that, but for counsel's...errors, the result of the proceeding would have been different," as required by *Strickland, Id.* at 694.

B. Strand and Ross

Strand and Ross raise five issues on appeal. First, they contend that the district court erred in allowing the trial to proceed when the government had failed to respond to their request for a bill of particulars. Second, they argue that their convictions are barred by

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[3] In support of this argument, Varah moves for reconsideration of his earlier motion to expand the appellate record to include the affidavit of his trial counsel. We DENY this motion because that affidavit was not part of the record below. We also DENY the motion to stay the appeal.

the five-year federal statute of limitations, 18 U.S.C. § 3282. Third, they allege that the court erred in allowing the introduction of Strand's prior convictions. Fourth, they contend that the district court erred in refusing to allow them a bench trial rather than a jury trial. Finally, they argue that the evidence does not support the jury verdict. We reject these contentions.

First, we cannot conclude that the district court erred in allowing the trial to proceed despite the government's failure to provide a formal bill of particulars to Strand and Ross. Strand and Ross did not follow the district court's instructions to prepare an order granting their motion for a bill of particulars. R., Vol. 7, at 14. "A court of records has been deemed to speak only through its records, and thus '[a]s a general rule, an order granted on a motion should, in order to become complete and effective, be entered, filed, or made a part of the minutes or record of the court.'" *United States v. Martinez*, 749 F.2d 623, 625 (11th Cir. 1984) (citations omitted). Even if such an order were unnecessary, the government substantially fulfilled its obligation by submitting the information sought in an alternative form.[4]

Second, we reject the argument that Strand's and Ross' convictions are barred by the five-year federal statute of limitations, 18 U.S.C. § 3282, for the same reasons stated during our discussion of Varah's claim that the mailings that formed the basis for his

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[4] Strand and Ross contend that the information provided by the government was insufficient because it did not accurately disclose the government's theory of the case. Brief of Appellant at 19-22, 24-25. However, "[a] bill of particulars may not be used to compel the Government to disclose evidentiary details or 'to explain the legal theories upon which it intends to rely at trial.'" *United States v. Gabriel*, 715 F.2d 1447, 1449 (10th Cir. 1983) (citation omitted). Rather, it is designed to allow the defendant to prepare a defense, to avoid prejudicial surprise at trial, and to bar the risk of double jeopardy. *See United States v. Barbieri*, 614 F.2d 715, 719 (10th Cir. 1980).

conviction were not in furtherance of the charged scheme.

Third, the court did not abuse its discretion when it allowed the government to introduce evidence regarding Strand's 1978 convictions for willfully failing to report income for federal tax purposes and for securities fraud. This evidence was highly probative as to the government's allegations that the appellants participated in a fraudulent scheme or conspiracy. In particular, it was relevant to the appellants' alleged agreement to conceal Strand's conviction from investors and business associates. Furthermore, the district court gave the jury appropriate limiting instructions at the time the evidence was admitted so as to minimize the potential for unfair prejudice.

Fourth, the argument that Strand and Ross were denied due process because the district court would not permit them to waive their right to a jury trial without the consent of the prosecution was expressly rejected in *Singer v. United States*, 380 U.S. 24, 36 (1965).

Finally, the record supports the jury verdict. In evaluating a claim of insufficient evidence, we must view all of the evidence in the light most favorable to the government and all reasonable inferences and credibility choices must be made in support of the jury's verdict. *United States v. Richard*, Nos. 91-6140, 91-6142, 91-6143, 91-6146, 1992 U.S. App. LEXIS 14448, at *16 (10th Cir. 1992). "Further, while the evidence supporting the conviction must be 'substantial' and 'do more than raise a mere suspicion of guilt,' it 'need not conclusively exclude every other reasonable hypothesis and it need not negate all possibilities except guilt.' Overall, we must determine whether any reasonable jury could find the defendants guilty beyond a reasonable doubt." *Id.* at *16-17 (citations omitted). Applying the above standard, we conclude that the government presented sufficient evidence such that a reasonable jury could find the appellants guilty beyond a reasonable doubt.

For the foregoing reasons, we AFFIRM the decision of the district court.

Entered for the Court

David M. Ebel
Circuit Judge

## APPENDIX B — LETTER DATED JULY 16, 1982 (TRIAL EXHIBIT 41)

RECEIVED AUG.2 1992
I.E.I
[stamp]

OVERLAND DOME PETROLEUM CORP.
18 East 41st St. Ste 1800
New York, N.Y. 10017
(212) 679-1760

July 16, 1982

Dear Limited Partner:

Enclosed is a letter dated July 13, 1982 issued by our parent company, Living Industries Inc. to its shareholders.

This method of communication is being used solely for the purpose of expediting the disemination [sic] of this important information to you.

The letter deals principally with Overland Dome Petroleum Co. (a Joint Venture of Overland Dome Petroleum Corp. and Classic Petroleum Corp.), the general partner of the limited partnership in which you are a participant.

We are aware of your concerns and will provide more detailed information as it becomes available.

Yours very truly,

OVERLAND DOME PETROLEUM CORP.
s/Jack E. Shaw
Jack E. Shaw, Director
s/A.L. Varah
A.L. Varah, Director

LIVING INDUSTRIES INC.
18 East 41st Street, Suite 1800
New York, N.Y. 10017
(212) 679-1760

July 13, 1982

**TO: THE STOCKHOLDERS OF LIVING INDUSTRIES, INC.**

Since we last reported to you concerning the affairs of the company on September 2, 1981, substantial disputes of concern to the Company have arisen and a number of material events have occurred about which we want to report to you:

1. In our letter of September 2, 1981, we reported that Overland Dome Petroleum Company (the "Joint Venture"), between Overland Dome Petroleum Corp. ("Overland Corp."), a subsidiary of the Company and Classic Petroleum Corp., a subsidiary of Classic Mining Corporation (the two Classic corporations are referred to together as "Classic"), had received a proposal from B.I. Associates, ("BI") and Overland Oil Field Construction, Inc. ("OCI") indicating their willingness to be acquired by the Joint Venture. The executive committee of the Board of Directors of the Company pursued this proposal. That committee felt a merger, on favorable terms, would be a positive development for both the Joint Venture and the Company as such a merger would result in the consolidation of the Joint Venture's assets and liabilities and would allow for the discharge of the Joint Venture's liabilities to OCI and BI on a systematic basis.

However, in the fall of 1981, disputes arose within BI and OCI and between those entities and the Joint Venture. BI and OCI indicated that they were no longer interested in pursuing the possible merger. In fact, the proposal was never formally reviewed by the executive committee of the Joint Venture because the representatives of Classic on that committee refused to convene such

a meeting.

Subsequent to the actions described below, OCI and BI filed liens on the Field in the amount of approximately $4.6 million for services and goods purportedly supplied in connection with the drilling activities in the Field.

2. By late October, 1981, management and the directors of the Company had become deeply concerned with Classic's discharge of its obligations as a participant in the Joint Venture. During this period, the Classic representatives on the executive committee of the Joint Venture took unilateral actions without consulting the representatives of the Company or Overland Corp. On October 26, 1981, the Company and Overland Corp. retained the law firm of Watkiss & Campbell of Salt Lake City, as counsel, to protect their interests in the Joint Venture. On October 27, 1981, an informal meeting of the executive committee of the Joint Venture was held and a series of meetings of the executive committee of the Joint Venture followed. Although the interests of both Classic and the Company were represented at these meetings, Classic continued to act unilaterally, even though several of its actions were specifically opposed by the representatives of Overland Corp.

For example, as we reported to you in the September letter, the Joint Venture was intending to deepen well #13-12, previously drilled to the Niobrara Formation, to a depth sufficient to test the Madison Formation. The Joint Venture was seeking necessary funding from an independent third party source in exchange for granting such third party a significant interest in the deepened well. Overland Corp. understood that a contract had been granted to a third party acceptable to it. However, during this series of meetings, it learned that Classic had entered into a unilateral arrangement for a deep test well with Mingo Oil Company, an entity controlled by Michael Strand. Mr. Strand owns or controls BI, OCI and other

related entities.

3. When the Company became aware of the Mingo arrangement and the Classic actions, it considered immediate legal action. However, the Amoco arrangement required that a deep test well had to be drilled on a specified schedule if the Joint Venture were to earn rights to the deeper formations. Therefore, after consultation with counsel, a business decision was made to defer any litigation which might interdict actual drilling of the deep test well. It was our view that claims concerning the allocation of the rights to the deeper formation between the Joint Venture and Mingo and the overall management of the Joint Venture by Classic should be deferred until the rights had been earned from the Amoco interests.

4. Disputes among the directors of Classic resulted in the commencement of a legal action in the United States District Court for the Middle District of Tennessee. This action was brought on April 2, 1982, by Raymond Lyell, a director of Classic on behalf of himself and all others similarly situated, against Classic, certain of its directors and officers, Michael Strand, the subsidiary of Classic which is a participant in the Joint Venture, BI, OCI, Mingo and entities affiliated with them.

The action seeks class certification and is based on allegations that the defendants have mismanaged Classic, failed to make full and fair disclosure of corporate activities, have conspired to improperly issue stock in Classic, have engaged in fraudulent securities practices and have diverted Classic's assets for their own purposes. The action seeks injunctive relief, damages in excess of $200,000,000 and orders restraining any transfers or other actions related to the Joint Venture activities by the defendants. This action is in the final discovery stages. The Company assisted in the preparation of the action and contributed to the cost of the litigation.

5. Overland Corp. on April 28, 1982, filed a petition in the

United States Bankruptcy Court for the Central Division of the District of Utah against the Joint Venture. The petition sought a declaration of the involuntary bankruptcy of the Joint Venture under Chapter 11 of the Bankruptcy Code and an appointment of a trustee to administer the affairs of the Joint Venture. On May 20, 1982, the Court ordered the involuntary bankruptcy and on July 2, 1982 it granted the petition for the appointment of a trustee. Anna Drake, an attorney with the legal firm of Nielsen & Senior in Salt Lake City has been appointed trustee by the Court.

This action was taken by Overland Corp. to provide an opportunity for the independent supervision of the affairs of the Joint Venture by a trustee and to ensure Court determinations of which creditor claims are to be honored and how the assets and liabilities of the Joint Venture are to be administered. The Company has been actively engaged in identifying appropriate third parties with sufficient capital resources and industry expertise to conduct further Joint Venture activities in the Field. A firm proposal has been developed for submission to the trustee.

6. In our letter of September 2nd, we also indicated that Wyoco Petroleum, Inc. ("Wyoco") had agreed, in principle, that the Company would acquire the assets of Wyoco attributable to its operations in the Field, subject to the trade accounts directly payable by Wyoco as a result of its operations of the Field. Wyoco is owned principally by A.L. Varah, the President and Chief Executive Officer of the Company. That arrangement has not been consummated because the Company has not received adequate financial information concerning Wyoco and other Field operations to properly assess the trade accounts of Wyoco. In March, 1981, Wyoco resigned as the operator for the Field.

On March 29, 1982, Wyoco filed a petition for voluntary relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. The management and operations of Wyoco have continued under the

bankruptcy provisions relating to operations by debtors in possession and Wyoco intends to reorganize its affairs. Wyoco's largest single receivable listed in this proceeding is approximately $6.6 million due to it from the Joint Venture.

7. As mentioned above, a trustee has been appointed in the Joint Venture bankruptcy. We anticipate that the trustee will obtain and supply to the Company and to appropriate independent accountants the financial records concerning the Joint Venture. These records are being held by Classic. Upon receipt of those records we will be in a position to prepare current Company financials for distribution to you.

8. At the next board of directors meeting a date will be set for a special shareholders meeting to elect a new board, to present financial statements and to discuss the other venture the Company is pursuing. It is anticipated that this meeting will be convened within 90 days of receipt of the financial information.

Yours very truly,

LIVING INDUSTRIES INC.

s/A.L. Varah

A.L. Varah,

President.

## APPENDIX C — LETTER DATED JANUARY 19, 1983 (DENOMINATED TRIAL EXHIBITS 317 AND 323)

LIVING INDUSTRIES INC.
18 East 41st Street, Suite 1800
New York, N.Y. 10017
(212) 679-1760

January 19, 1983

Dear Limited Partner:

I have a copy of the January 11, 1983 letter of W. Raymond Lyell addressed to you. That letter is inaccurate, and fails to present the complete picture of what has been done and what is being done by Living Industries, Inc. to protect the rights of all investors. Before contributing to Mr. Lyell, I would urge that your show the contents of this letter and its attachments to your attorney.

1. The Chapter 11. (a) As you know, Living Industries, Inc. owns 100% of the shares of stock of Overland Dome Petroleum Corporation. On April 28, 1982, that corporation brought a proceeding in the Bankruptcy Court in Salt Lake City, Utah, involuntarily placing Overland Dome Petroleum Company (a joint venture owned by Overland Dome Petroleum Corporation and Classic Petroleum Corporation) in Chapter 11 under the Bankruptcy Law. Chapter 11, designed to avoid liquidation, provides the means to protect the assets of a company in Chapter 11 while at the same time having all of its affairs subjected to the jurisdiction of the Court, and encouraging the formulation of a fair and equitable viable plan for the rehabilitation of such company. An additional reason that we chose to put Overland Dome Petroleum Company into Chapter 11 was that the Bankruptcy Court has wide investigative powers to look into all aspects of past transactions and dealings of the company and individuals who are responsible for its management and administration. We felt that this was the best way of protecting the

interests of those who had invested. To date, the legal fees, interests and costs have totaled in excess of $100,000. We have not asked any individuals to contribute to the cost thereof.

(b) There have been positive results. Mr. Lyell recites, claiming credit for it (p.3), that "***we caught about $250,000 in oil money", only later reciting on the same page that "***there is approximately $250,000 that is being held by the bankruptcy court***". What Mr. Lyell does not disclose is that that $250,000 was "caught" by the activities of Living Industries, Inc. in the Chapter 11 proceeding.

(c) Another positive result of the Chapter 11 proceeding: over $3,000,000 worth of physical assets are paid third party liens for Overland Dome Petroleum Company have been tied up for its benefit in the Chapter 11 proceeding; the value of these assets should compensate the investors for some $2,000,000 which we believe had been looted from the company.

(d) Mr. Lyell has had no part whatsoever in tying up this approximately $3,250,000 worth of cash and assets.

2. *The Nashville suit and The Chapter 11.* (a) Mr. Lyell is quite inaccurate in his description of the Nashville lawsuit. He recites that it was filed in April of 1982 — but the action that was filed in April 1982 did not attempt to include either Living Industries, Inc. or myself as defendants; it was not until December of 1982 that he purported to file an amended complaint naming us as defendants. Thus, the $50,000 bond (now reduced to $10,000) had nothing to do with us — and the seven provisions of the Order that he refers to had absolutely nothing to do with us whatsoever, and still have nothing to do with us.

(b) The last paragraph on page 2 of Mr. Lyell's letter completely confuses the picture. Firstly, you do know that Overland Dome Petroleum Corp., placed the Joint Venture of Overland Dome Petroleum Co. into a Chapter 11 bankruptcy proceeding, since we

wrote to you to that effect on July 16, 1982. Mr. Lyell then misleadingly states that Mr. Strand and his other companies, along with Wyoco Petroleum Inc., attempted to foreclose on the field and the limited partnerships. First of all, Wyoco did *not* proceed against anyone or anything. Secondly, neither Mr. Strand nor his companies attempted to foreclose on the field or the limited partnerships by the Chapter 11. Strand had indeed, through his B.I. Associates and Overland Oil Field Construction Inc. companies, attempted to foreclose and appoint a receiver in a State court proceeding in Wyoming — but we (not Mr. Lyell nor Mr. Holt) stopped the attempted foreclosure by the filing of the Chapter 11 in Salt Lake City. When Mr. Lyell claims that Strand used the Chapter 11 to foreclose, he is thus dead wrong — the Chapter 11 was used by us to *prevent* Strand from foreclosing.

3. Living's past subsidy of the Nashville suit — and the thanks it got. (a) As you are probably aware, Classic Petroleum Corporation is owned by Classic Mining Corporation. Mr. Lyell had been quite active in Classic Mining Corporation, having been a Director thereof during 1980, 1981 and most of 1982. On February 17, 1982, Mr Lyell attended a Board of Directors Meeting of Living as an invited guest. He requested assistance from Living Industries, Inc., in his endeavors. As a result, the Board unanimously resolved that the Executive Committee be empowered to give Mr. Lyell whatever assistance it deems appropriate. After the close of the meeting, he was advanced $2,000 by Living Industries, Inc. to cover postage and mailing expenses regarding the calling of a shareholders meeting of Classic Mining Corporation. It was Living Industries, Inc. which, with Mr. Lyell's consent, set up a meeting with his present attorney, Mr. Holt, on March 5, 1982 in Nashville. Mr. Lyell had not been a client of Mr. Holt prior to that date, and had had no conversation with him regarding the matter. As a result of that meeting, Living Industries, Inc. advanced $10,000 to Mr. Holt, and agreed to advance up to $25,000 if Mr. Lyell could not raise the full $25,000. The

agreement also provided that all funds advanced including the initial $10,000 would be returned to Living Industries, Inc. Annexed hereto is a copy of Mr. Holt's March 5, 1982 letter to such effect. To date, Mr. Lyell has not returned the $12,000.

(b) When Mr. Lyell began the lawsuit he refers to in Federal Court in Nashville, as you saw, from the above, Living Industries, Inc., and I as its President, had assisted him in bringing that lawsuit. Though Mr. Lyell implies at page 2 of his letter that my deposition was taken by his attorneys, this is not so; the deposition that was taken of me and of Ms. Hauser was taken by the defense attorneys.

(c) Living Industries, Inc., through me as its President, has thus subsidized and partly paid for this Federal Court action in Tennessee. Mr. Holt, Mr. Lyell's attorney, actively sought my assistance in preparing the papers. After having obtained not only our financial assistance but my assistance in helping prepare the papers against the original defendants in that case, Mr Lyell and Mr. Holt, for reasons not completely clear to me (but see paragraph 3(e) below), suddenly turned on us, and purported to name Living Industries, Inc. and me as parties defendants. (As proof that Living and I helped him, I annex hereto copies of Mr. Holt's March 17 and March 30, 1982 letters.) Thus, having helped Mr. Lyell in his litigation, (as he now asks you to do), Mr. Lyell and his attorney turned upon us and are actively attempting to sue us. I do not want to characterize such activities; I suggest that you seek from your own attorney a characterization of such activities.

(d) Mr. Lyell and his attorney at one point believed that they had the $3,000,000 worth of assets we referred to in paragraph 2(c) above tied up, by having made a stipulation with one particular company. They were wrong. As we discovered in the Chapter 11 proceeding, that company had already disposed of the assets. We then promptly proceeded, successfully, to tie up those assets. Mr. Lyell did nothing in this regard.

(e) Another question remains. Why have Mr. Holt and Mr

Lyell, after seeking and obtaining my assistance in drafting his complaint, and after obtaining an advance of fees from Living Industries, Inc., suddenly turned around and attempted to sue Living Industries, Inc., and me? Could it be that Mr. Lyell does not want to return the $12,000 advance? Additionally, I should note that just before he filed the Nashville lawsuits, Mr. Lyell requested assistance in obtaining a loan in the amount of $35,000. I personally had to guarantee the loan to get it for Mr. Lyell from a Mr. Jennings and I guaranteed it. The $35,000 note, copy of which is annexed, has not been paid, and is presently in default. could it be that Mr. Lyell has attempted to include Living Industries, Inc. and me as parties defendant in an attempt to avoid repayment of the $47,000?

(f) As noted above, Mr. Lyell has not repaid to us the $47,000 which he *promised* to repay, and some of which is past due; instead, he attempts to sue us. He now solicits assistance from you, and he does not even *promise* to repay you, but merely recites (page 3) that "it is our desire and intention that all investors that help with the expense be repaid before any distribution of duns (*sic*) to other investors." As your lawyer will tell you, this does *not* constitute a promise to pay back your money. When we have not been repaid even a penny, despite a written promise to repay us, can *you* really expect to ever be repaid, in the *absence* of any written promise to repay? Indeed, you have no way at all, should you desire to advance funds to Mr. Lyell, to insure that the funds are used for the purposes of the litigation he refers to.

(g) We have not solicited any individuals, and will not solicit them, for any of the huge legal costs that we have incurred, either in the Chapter 11 proceeding in Salt Lake City, or for our advances to Mr. Lyell for the Tennessee lawsuit.

4. The now-announced self-defeating goals of Mr. Lyell. (a) On page 3, Mr. Lyell recites the possible goals of his lawsuit. His third goal is to use any recovery to repay the legitimate debts of the field, which he believes to be about $200,000. However, those

legitimate debts exceed $2 million, in addition to a debt to Wyoco Petroleum Inc., in an amount to be determined. He also recites, as his second goal, the acquiring of title of all leased acres in the field — but he fails to note that the company in Chapter 11 already has such title.

(b) In essence, Mr. Lyell apparently seeks to do exactly what we are tying to accomplish, *but* to oust us from all participation. It should be remembered, however, that had we not been vigilant in filing the Chapter 11 proceeding, some $3.25 million would have been lost while Mr. Lyell did nothing.

(c) If the company in Chapter 11 is to be ousted, then the Limited Partners would lose all the benefits that would otherwise flow to them from the Chapter 11 proceedings. Somehow or other, Mr. Lyell hopes to remove the General Partner, but still keep the General Partner's assets in the partnerships. How he proposes to do this, we do not understand; if the General Partner is removed, its assets go with it, the field is lost, the amount secured for its benefit is lost — all is lost. The Limited Partners would have a partnership interest in nothing.

(d) However, our Chapter 11 plan of re-organization, if unimpeded, together with other actions being planned by us, will protect your interests — not annihilate them. Two Limited Partners have already been appointed to the Creditor's Committee, and thus the interests of the Limited Partners will be fully protected, under Court supervision. Neither Mr. Holt nor Mr. Lyell have assisted the Chapter 11 in any way whatsoever, but instead have rendered a dis-service, since we now have to dilute our energies by fighting those who pretended to be our allies but turned upon us. However, despite all their obstacles, we shall do our best to see this through and protect the interests of all the investors.

(e) We have contacted a number of Limited Partners, and we know that the majority of those we have contacted do not support

Mr. Lyell in his actions. We urge you, too, not to support Mr. Lyell.

Answers to questions and any specific further documentation you desire can be obtained by contacting us.

Very truly yours,

Living Industries, Inc.

s/A.L. Varah

A.L. Varah,

President

Supreme Court, U.S.
FILED
DEC 28 1992
OFFICE OF THE CLERK

No. 92-752

# In the Supreme Court of the United States

OCTOBER TERM, 1992

A. LEONARD VARAH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the district court erred in instructing the jury on the defense of withdrawal from a conspiracy.

2. Whether the evidence was sufficient to convict petitioner of mail fraud and securities fraud.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a11) is not reported, but the judgment is noted at 972 F.2d 357 (Table). A previous opinion of the court of appeals is reported at 952 F.2d 1181.

### JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992. The petition for a writ of certiorari was filed on October 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted on one count of conspiracy to commit mail

fraud (18 U.S.C. 371), three counts of mail fraud (18 U.S.C. 1341), and two counts of securities fraud (15 U.S.C. 77q and 77x). He was sentenced to seven years' imprisonment and fined $150,000. The court of appeals affirmed. Pet. App. a1-a11.[1]

1. The evidence at trial showed that between 1977 and 1983, Galen Ross, Michael Strand, and petitioner participated in a conspiracy to defraud investors through the use of false and misleading information. Ross was president of Classic Mining Corporation, and Strand was a significant stockholder in the company. They promoted Classic's stock on the basis of the company's ownership of mineral rights in Wyoming, and they hired petitioner, a New York stock promoter, to assist in their efforts. Pet. App. a2.

Ross, Strand, and petitioner employed various fraudulent techniques to encourage investment. For example, petitioner purchased Living Industries, a dormant shell corporation, and arranged for Classic and Living to enter into a joint venture—the Overland Dome Petroleum Company—for oil and gas exploration. The joint venture sold limited partnership interests at inflated prices for each well that was to be drilled, circulated misleading information about the drilling activities, and concealed from investors the actual drilling costs and production figures. Those fraudulent activities substantially enriched petitioner. Pet. App. a3; Gov't C.A. Br. 13-24.[2]

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[1] Petitioner was tried with co-defendants Galen J. Ross and Michael W. Strand, who were also convicted of mail fraud and conspiracy to commit mail fraud. The court of appeals affirmed their convictions. Pet. App. a8-a11.

[2] Ross, Strand, and petitioner used other misleading techniques to promote investment. For example, in 1979 Classic

By 1981, investors had become suspicious. Ross, Strand, and petitioner responded by sending several "lulling" letters. In April 1982, Ross sent a letter to Classic's shareholders announcing the drilling of a deep test well. The letter painted an optimistic picture of Classic's prospects and failed to disclose any of Classic's problems. Pet. App. a7; Gov't C.A. Br. 24-26. On July 16, 1982, petitioner sent a letter to the joint venture limited partners informing them that a class action had been filed against Strand, Ross, and others, but suggesting that neither he nor his companies had engaged in any wrongdoing. Pet. App. a7, a12-a17; Gov't C.A. Br. 28. In January 1983, after he was joined as a defendant in the class action, petitioner again wrote the limited partners. He assured them that his company was protecting the rights of the investors and urged the investors not to support the class action. The investors in fact did not provide support for the suit, and it was dismissed. Pet. App. a7; Gov't C.A. Br. 28-29.

2. Petitioner argued at trial that he withdrew from the conspiracy in September 1981. In support of that contention, he relied on testimony that purportedly showed "great hostility and no communication between Strand and petitioner from the middle

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announced to its shareholders that it had entered into a uranium mining joint venture with Fulton Investment Corporation under which Fulton would develop Classic's uranium reserves, pay all mining expenses, and extract and purchase 200,000 pounds of ore per year. The defendants failed to reveal that Classic's entire uranium claim amounted to no more than 171,000 pounds of ore or that petitioner controlled Fulton. No uranium was ever mined or sold, and Fulton never purchased any ore under the agreement. Pet. App. a2-a3; see Gov't C.A. Br. 10-12.

of 1981 until the time of trial." Pet. 16; Pet. C.A. Br. 28; but see Gov't C.A. Br. 31 n.29. The trial court charged the jury that petitioner bore the burden of establishing his withdrawal from the conspiracy, Pet. App. a5, and petitioner did not object to that instruction. Pet. 12; Gov't C.A. Br. 32.

On appeal, petitioner argued that the trial court's instruction impermissibly shifted the burden of proof to him to prove that he had withdrawn from the conspiracy. The court of appeals rejected that argument, stating that its precedents placed the burden of persuasion on the defendant. Pet. App. a5-a6. Petitioner also argued that the evidence was insufficient to support his mail fraud and securities convictions because the mailings were not lulling letters. Pet. App. a6. The court of appeals also rejected that argument, finding that Ross's April 1982 letter as well as petitioner's letters in July 1982 and January 1983 contained statements that the jury reasonably "could have construed as an attempt to lull the investors into a false sense of security and thereby to postpone investigation into the [defendants'] scheme." Pet. App. a8.

## ARGUMENT

1. Petitioner challenges the court of appeals' ruling that a defendant has the burden of proving withdrawal from a conspiracy. Pet. 13-18. The courts below correctly recognized that, while the government has the burden of providing beyond a reasonable doubt every element of the conspiracy offense, a defendant seeking to avoid criminal liability has the burden of proving the affirmative defense that he withdrew from the conspiracy.

A withdrawal defense requires not only that a defendant have ceased participating in the conspiracy, but also that he either have disclosed the conspiracy to the authorities or at least have done some "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators * * *." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464 (1978). Even if the defense is established, it does not excuse the defendant from criminal responsibility for his prior conspiratorial acts but instead simply serves as a foundation for other defenses, such as a statute of limitations claim. See, *e.g.*, *United States Gypsum Co.*, 438 U.S. at 465 n.38.[3]

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[3] See also *United States* v. *Read*, 658 F.2d 1225, 1232-1233 (7th Cir. 1981) (withdrawing "defendant is still liable" for prior conspiratorial acts and withdrawal "becomes a complete defense only when coupled with the defense of the statute of limitations"); cf. Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 957 (1959) ("[I]n those jurisdictions which have overt-act requirements, the defendant is not punishable as a member of the conspiracy if he withdraws before an overt act is committed.") (footnote omitted).

This Court has long held that a defendant who claims that he withdrew from the conspiracy must show some "affirmative action" constituting withdrawal. *Hyde* v. *United States*, 225 U.S. 347, 369 (1912). In *Hyde*, the Court ruled that a defendant's participation in a conspiracy continues whether or not he performs acts in furtherance of the conspiracy and that "until he does some act to disavow or defeat the purpose he is in no situation" to assert a withdrawal defense. *Ibid.* In accordance with *Hyde*, the overwhelming majority of the courts of appeals have held that a defendant bears the burden of proving his withdrawal from a conspiracy.[4]

Petitioner argues (Pet. 13, 15) that the court of appeals' decision conflicts with the Seventh Circuit's decision in *United States* v. *Read*, 658 F.2d 1225 (1981). That court construed *Hyde* as deciding only who bears the burden of production rather than the burden of proof, and it declined to follow prior Seventh Circuit cases placing on defendants the burden of proving withdrawal. *Id.* at 1234-1236. See, *e.g.*, *United States* v. *Dorn*, 561 F.2d 1252, 1256 (7th Cir. 1977). The court reasoned that the Due

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[4] See, *e.g.*, *United States* v. *Dyer*, 821 F.2d 35, 39 & n.6 (1st Cir. 1987); *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.), cert. denied, 379 U.S. 960 (1965); *United States* v. *Gillen*, 599 F.2d 541, 548 (3d Cir.), cert. denied, 444 U.S. 866 (1979); *United States* v. *Branch*, 850 F.2d 1080, 1082-1083 (5th Cir. 1988), cert. denied, 488 U.S. 1019 (1989); *United States* v. *Lash*, 937 F.2d 1077, 1083 (6th Cir.), cert. denied, 112 S. Ct. 397 (1991); *United States* v. *Granados*, 962 F.2d 767, 773 (8th Cir. 1992); *United States* v. *Russell*, 963 F.2d 1320, 1323 (10th Cir.), cert. denied, 113 S. Ct. 280 (1992); *United States* v. *Finestone*, 816 F.2d 583, 589 (11th Cir.), cert. denied, 484 U.S. 948 (1987).

Process Clause requires the government to "disprove the defense of withdrawal beyond a reasonable doubt," because withdrawal "directly negates the element of membership in the conspiracy during the period of the statute of limitations." *Read*, 658 F.2d at 1233. The court left intact, however, the rule that "the burden of going forward with evidence of withdrawal * * * remains on the defendant." *Id.* at 1236.

Since the Seventh Circuit's decision in *Read*, this Court has decided cases undermining *Read*'s suggestion that the Due Process Clause forbids placing the burden of proving withdrawal on a defendant. For example, in *Martin* v. *Ohio*, 480 U.S. 228 (1987), this Court held that a State does not violate due process by requiring a murder defendant to bear the burden of proving self-defense. And in *Medina* v. *California*, 112 S. Ct. 2572 (1992), the Court ruled that a State may constitutionally require the defendant to bear the burden of proving incompetence. As with those other defenses, requiring a defendant to establish withdrawal does not "offend[] [any] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 2577.

Not only have decisions of this Court undermined *Read*'s rationale, but the Seventh Circuit itself has called that decision into question. The Seventh Circuit stated in a case decided after *Read* that " 'the burden of establishing withdrawal lies on the defendant.' " *United States* v. *Patel*, 879 F.2d 292, 294 (7th Cir. 1989) (Posner, J.) (quoting Judge Friendly's opinion in *Borelli*, 336 F.2d at 388), cert. denied, 494 U.S. 1016 (1990). But see *United States* v.

*Rossy*, 953 F.2d 321, 325 (7th Cir.) (following *Read*), cert. denied, 112 S. Ct. 1240 (1992). Given the continuing intra-circuit conflict on that issue, the Seventh Circuit may be persuaded to reconsider the issue en banc. If the Seventh Circuit follows the decisions of the other circuits, it would eliminate any need for review by this Court.[5]

Even if this Court concludes that the Seventh Circuit is committed to its position in *Read* and that the circuit conflict is likely to persist, this case is not an appropriate vehicle for resolving the conflict. Petitioner based his withdrawal defense primarily on the assertion that he had terminated his working relationship with Strand and was in fact "working to defeat him." Pet. 16. But his evidence merely shows that he had a stormy relationship with Strand and that when the investors grew suspicious he placed his own financial interests before those of Strand. See Pet. 16-18. Such evidence is insufficient to show that he withdrew from the conspiracy. See *United States Gypsum Co.*, 438 U.S. at 464 (1978); *United States* v. *Bafia*, 949 F.2d 1465, 1477-1478 (7th Cir. 1991), cert. denied, 112 S. Ct. 1989 (1992); *United States* v. *LeQuire*, 943 F.2d 1554, 1564 (11th Cir. 1991), cert. denied, 112 S. Ct. 3037 (1992); *United States* v. *Patel*, 879 F.2d at 294.

Moreover, petitioner failed to object to the instruction that placed the burden of establishing the defense of withdrawal on the defendant. He therefore waived the issue, and it can be reviewed by this

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[5] This Court recently denied a petition for a writ of certiorari in *United States* v. *Payne*, 962 F.2d 1228 (6th Cir. 1992), cert. denied, No. 92-517 (Dec. 14, 1992), which presented the same issue.

Court only if the instruction is deemed plain error. See Fed. R. Crim. P. 30, 52(b).

2. Petitioner also argues (Pet. 19-22) that the evidence was insufficient to support his conviction, because his July 1982 and January 1983 letters were not "lulling letters." Petitioner recognizes that a lulling letter in a mail fraud or securities fraud scheme is correspondence "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States* v. *Maze*, 414 U.S. 395, 403 (1974). Petitioner argues that his two letters cannot be deemed lulling letters within that definition, because they alerted the recipients to the class action lawsuit filed against Classic.

The jury resolved that factual issue against petitioner, and no reason exists for further review of its decision. As the court of appeals explained, "the mailings in dispute contain statements that *could* reasonably be construed as an attempt to lull the investors into a false sense of security and thereby to postpone investigation into the [defendants'] scheme." Pet. App. a8 (emphasis in original). The evidence taken as a whole supports the jury's finding that petitioner's letters were part of the conspiracy to defraud investors, and the court of appeals properly "refuse[d] to set aside the jury's verdict on this ground." *Ibid.*

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
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LOUIS M. FISCHER
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DECEMBER 1992

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